No. 82-2028

In the Supreme Court of the United States

OCTOBER TERM, 1983

PAUL ARNOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in light of the overwhelming evidence of petitioner's guilt and the frivolous nature of his entrapment defense, the district court committed reversible plain error in permitting a witness subpoenaed by the defense to rest upon a blanket claim of Fifth Amendment privilege.

2. Whether the district court erred in refusing to restrict cross-examination of an intended defense witness.

3. Whether there was sufficient evidence of the existence of a conspiracy to permit the admission of out-of-court co-conspirator statements.

4. Whether weapons found in a co-conspirator's residence were properly admitted at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 704 F.2d 322.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1983. The petition for a writ of certiorari was filed on June 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts charging him with conspiracy to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 1); conspiracy to manufacture phencyclidine,

in violation of 21 U.S.C. 841(a)(1) and 846 (Count 2); distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 3); and use of a communications facility to facilitate the distribution of cocaine, in violation of 21 U.S.C. 843(b) (Count 4). He was sentenced to eight-year terms of imprisonment on Counts 1, 2, and 3 and a two-year term on Count 4, all to run concurrently with each other and with petitioner's state sentence for parole violation. In addition, a five-year special parole term was imposed (Pet. App. B1-B4).

1. The factual background of petitioner's case is as follows. In early January 1981, Joe Frontiera, a confidential informant, told Michigan State Police Sergeant Robert Bertee that Ronald Conn, one of petitioner's co-conspirators, was involved with others in the cocaine business and in the manufacture of phencyclidine, a controlled substance (1 Tr. 19; 2 Tr. 181-182).[1] In February 1981, another confidential informant introduced Sergeant Bertee, acting in an undercover capacity, to Conn (2 Tr. 182). At that first meeting, Conn and Bertee discussed the possibility of Bertee's purchasing cocaine from Conn and of Conn's purchasing piperidine from Bertee (1 Tr. 6-9).[2] On February 4, Bertee purchased cocaine from petitioner and Conn (1 Tr. 23-36). Bertee recognized petitioner as someone who was present during his first meeting with Conn and who answered Conn's telephone during Bertee's aborted first attempt to purchase cocaine from them (1 Tr. 6, 10, 17, 24).

Between February 4 and 26, Bertee had several conversations separately with petitioner and Conn regarding Bertee's purchase of a large quantity of cocaine and the purchase by petitioner and Conn of piperidine from

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[1] "Tr." refers to the trial transcript.

[2] Piperidine is a chemical used in the manufacture of phencyclidine (1 Tr. 5). See 21 U.S.C. (Supp. V) 841(d).

Bertee (1 Tr. 37-40). On February 26, Bertee met petitioner and discussed the proposed transactions, and petitioner provided Bertee with a sample of cocaine (1 Tr. 42-52). On March 11, pursuant to the plan to manufacture phencyclidine, Bertee gave petitioner a half-gallon of piperidine (1 Tr. 1-9, 55-63; 5 Tr. 578-587).

Bertee was subsequently informed by petitioner that he was going to Florida in early April to obtain the kilogram of cocaine they had previously discussed. On April 1, 1981, Conn told Bertee that petitioner was in Florida to pick up the cocaine (2 Tr. 83). On April 2, petitioner telephoned from Florida to notify Bertee that he would be returning the next day (2 Tr. 84).

On April 3, Bertee began recording his phone conversations with the subjects of the investigation (2 Tr. 85). He spoke to petitioner, petitioner's girlfriend, and Conn, all of whom advised him of petitioner's progress in Florida and his return date (2 Tr. 93-95, 112-113, 123-126). On April 4, petitioner delivered a kilogram of cocaine to Bertee and a DEA agent (2 Tr. 165-173). The officers then arrested petitioner, and a search warrant was executed for Conn's residence (2 Tr. 165-173).

2. On appeal, petitioner raised numerous issues, including those presented in his petition. The court of appeals rejected all of petitioner's contentions as nonmeritorious, except his claim that he should have been permitted to examine Conn, who was subpoenaed by the defense but refused to testify on Fifth Amendment grounds and whose out-of-court statements were admitted under the co-conspirator rule. Fed. R. Evid. 801(d)(2)(E). Although holding that Conn should have been required to assert the privilege with respect to particular questions, the court of appeals held that no "fundamental rights were affected" by the error because Conn's hearsay statements were "few and cumulative to the overwhelming evidence against [petitioner]" and because petitioner's entrapment defense was

"specious" since the criminal offenses upon which petitioner was indicted occurred months after his last contact with Frontiera, who petitioner alleged had entrapped him (Pet. App. A11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is accordingly not warranted.

1. Petitioner first argues (Pet. 20-26) that the district court committed reversible error by permitting Conn's attorney to assert the Fifth Amendment privilege on his client's behalf instead of requiring Conn, who was physically incapacitated, to assert the privilege with respect to particular questions. As the court of appeals' recognized (Pet. App. A10), a witness generally should not be permitted to rest upon a blanket claim of Fifth Amendment privilege. See *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951). But, as the transcript excerpt quoted in the petition (Pet. 22-23) makes clear, petitioner did not object on this ground to the procedure followed by the district court.[3] Instead, petitioner argued that Conn could not claim the privilege at all because he had pled guilty to the indictment and that Conn should be required to assert the privilege in the presence of the jury (8 Tr. 1112). Neither of these arguments is valid. Because of the risk of prosecution for other related federal and state offenses, Conn's guilty plea did not preclude assertion of the privilege. And a witness need not assert the privilege in the jury's presence, because the assertion of the

[3] Moreover, at trial, petitioner asserted only his right to compulsory process, claiming the need to call Conn to bolster his entrapment defense (8 Tr. 1112-1113; 9 Tr. 1144-1145). Petitioner did not suggest that he wished to confront Conn about his coconspirator statements.

privilege, while of no evidentiary significance, can be highly prejudicial. *United States* v. *Lyons*, 703 F.2d 815, 818-819 (5th Cir. 1983); *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973). See also *Namet* v. *United States*, 373 U.S. 179, 186 (1963); *United States* v. *Nunez*, 668 F.2d 1116, 1123 (10th Cir. 1981); *Bowles* v. *United States*, 439 F.2d 536, 541 (D.C. Cir. 1970), cert. denied, 401 U.S. 995 (1971). But see *United States* v. *Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980) (calling witness who will assert privilege sometimes permitted, but request must be closely scrutinized).[4]

While it may be true that courts should not ordinarily accept blanket assertions of the privilege, we cannot agree that it was error to adopt such a procedure in the absence of objection from the parties. While petitioner evidently wished to have Conn's assertion of the privilege overridden entirely, it may have been perfectly clear to him that, failing that, all the questions he intended to propound properly could be—and in fact would be—resisted on the basis of the privilege. Thus, his failure to request that Conn be brought before the court to invoke his privilege in response to specific questions can properly be treated as a recognition that such a procedure would have been wasteful and fruitless.

But even if the court should have insisted on such a procedure sua sponte, the court of appeals was correct in its fact-bound conclusion that any error did not affect petitioner's substantial rights so as to justify reversal under Fed. R. Crim. P. 52(b) as plain error. See *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Indeed, it seems clear that reversal would not have been justified even if petitioner had preserved his claim by

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[4] The district court in fact stated that it would consider requiring Conn to assert the privilege in the jury's presence if petitioner provided authority for that procedure, but petitioner failed to do so (8 Tr. 1112-1116; 9 Tr. 1145).

appropriate objection, since any error was harmless when viewed in the context of the entire trial.

Petitioner has contended that Conn's testimony could have helped him in two ways. First, at trial, petitioner claimed only that Conn's testimony would corroborate his entrapment argument (8 Tr. 1112-1113). Petitioner asserts (Pet. 11-12) that he was initially unwilling to engage in any narcotics scheme and had even returned marijuana that he had agreed to sell. He claims (Pet. 12) that he was "prevailed upon by Fronteira [*sic*] and Conn to be involved in the selling of drugs." However, petitioner's own testimony at trial supports the court of appeals' conclusion that petitioner's entrapment defense was "specious" (Pet. App. A11). Petitioner did not return the marijuana because he was unwilling to engage in illegal conduct but rather because he was unable to sell the cocaine as quickly as Frontiera urged. As petitioner testified (7 Tr. 897): "[It] just seemed like he was putting me through too much, too many changes to make it worth my while." Further undercutting petitioner's alleged entrapment by Frontiera was petitioner's acceptance of a role in another marijuana scheme when he arrived to return the marijuana he felt too pressured to sell (8 Tr. 897-898). Upon completion of that marijuana deal, petitioner agreed to try "moving" some cocaine (8 Tr. 898-899). Furthermore, petitioner never hesitated to participate in Frontiera's narcotics ventures. And, as the court of appeals correctly observed (Pet. App. A11), the events for which petitioner was indicted occurred months after his last encounters with Frontiera, and any alleged entrapment in early drug activities did not taint the events at issue here.

Second, even assuming that petitioner had intended to confront Conn about the co-conspirator statements admitted through Bertee's testimony (see page 4 note 3, *supra*), his inability to do so was not prejudicial in light of what petitioner concedes is the "overwhelming

evidence against him" (Pet. 31). The principal evidence at trial was the testimony of two Michigan state police officers and one DEA agent who dealt directly with petitioner in an undercover capacity (1 Tr. 4-68; 2 Tr. 74-181; 3 Tr. 341-370; 4 Tr. 393-412, 506-520). The officers testified about their purchases of cocaine from petitioner, the delivery to him of a half-gallon of piperidine, and numerous telephone conversations about these transactions. In the face of this testimony, Conn's co-conspirator statements were, as the court of appeals correctly concluded (Pet. App. A11), "few and cumulative."

2. Petitioner next contends (Pet. 35-50) that he was denied his right to confront Frontiera, the government informant. But since Frontiera was not called by the government and no statements made by him were admitted in the government's case, petitioner was not denied the right to confront one of the witnesses against him. Assuming that petitioner's real objection is that he was denied the right of compulsory process, that contention is also without merit.

Petitioner intended to call Frontiera to corroborate his entrapment testimony (Pet. App. A2). Because Frontiera had been indicted on unrelated charges and petitioner did not want to jeopardize Frontiera's Fifth Amendment privilege, petitioner moved under Fed. R. Evid. 611 for a preliminary ruling limiting the scope of the prosecution's cross-examination to the scope of the direct examination (8 Tr. 1098-1101). The district court quite reasonably declined to rule on that motion without knowing what questions would be asked (8 Tr. 1100). During a voir dire examination, Frontiera indicated that he would assert his privilege and refuse to answer any potentially incriminating question unless the court granted him "full immunity" (Pet. App. A3; 8 Tr. 1105). Despite the district court's explicit invitation, petitioner's counsel refused to pose any specific

questions; defense counsel merely assured the district court that no direct questioning would implicate the privilege (Pet. App. A3-A4; 8 Tr. 1106). Under these circumstances, the court correctly refused to restrict cross-examination.

Cross-examination properly includes not only "the subject matter of the direct examination," but also "matters affecting the credibility of the witness" (Fed. R. Evid. 611(b)), which is "a very fertile field" (*United States* v. *Raper*, 676 F.2d 841, 847 (D.C. Cir. 1982)). It is well settled that "a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, 402 U.S. 183, 215 (1971). Similarly, the privilege cannot be used to limit the government in its cross-examination of defense witnesses to those portions of an event that are favorable to the defense. See *United States* v. *Raper*, *supra*, 676 F.2d at 847.

It is also well established, as petitioner himself argued on appeal with respect to Conn, that a district court generally may not rule on a witness's claim of the Fifth Amendment privilege until the witness has asserted the privilege in response to a particular question. The refusal by petitioner's counsel to proffer his questions to Frontiera deprived the district court of the opportunity to consider whether they might provoke a valid claim of privilege on either direct or cross-examination. Petitioner cannot now claim that the court's failure to rule deprived him of any right. Any deprivation was entirely self-inflicted.[5]

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[5] Moreover, the claim that Frontiera would corroborate petitioner's entrapment defense is not persuasive in the face of this record. The pivotal issue in an entrapment defense is whether the defendant was predisposed to commit the offense charged. *Hampton* v. *United States*, 425 U.S. 484 (1976); *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932). As already noted, see page 6, *supra*, petitioner's own testimony effectively settled that issue.

Moreover, the question whether to limit the scope of cross-examination is entrusted to the trial court's discretion. See *United States* v. *Raper*, *supra*, 676 F.2d at 846; Fed. R. Evid. 611(b). The court of appeals correctly ruled that there was no abuse of discretion here.

3. Petitioner also challenges (Pet. 50-58) the district court's admission of his co-conspirators' statements. In particular, he argues that the evidentiary predicate for the admission of such statements in the Sixth Circuit differs from the standard used by other courts of appeals. But since the statements at issue in this case would have been admissible under the test employed by any court, there is no need for review by this Court.

Almost all the courts of appeals that have addressed the issue do not admit co-conspirator statements into evidence without a showing by a preponderance of the evidence independent of such statements (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is admitted were both members of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. See *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); *Government of Virgin Islands* v. *Dowling*, 633 F.2d 660, 665 (3d Cir.), cert. denied, 449 U.S. 960 (1980); *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); United States v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States* v. *Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980); *United States* v. *Jackson*, 627 F.2d 1198, 1213-1220 (D.C. Cir. 1980). The Ninth Circuit requires evidence sufficient to establish a prima facie case. *United States* v. *Miranda-Uriarte*, 649 F.2d 1345, 1349 (1981).

The Sixth Circuit employs the preponderance-of-the-evidence test but permits the trial court to consider the co-conspirator statements themselves when making its determination. *United States* v. *Vinson*, 606 F.2d 149, 153 1979), cert. denied, 444 U.S. 1074, 445 U.S. 904 (1980).

In this case, the record does not show what test the district court applied (see 6 Tr. 863-864). It is clear, however, that there was sufficient independent evidence to establish the existence of the conspiracy and that the statements consequently would have been admissible in any circuit. The government's principal witnesses, state and federal undercover officers, testified in detail about the co-conspirators' activities and petitioner's admissions. Indeed, in another context, the court of appeals described the statements of Conn, the principal co-conspirator, as "few and cumulative" (Pet. App. A11).

4. Finally, petitioner maintains (Pet. 58-63) that the admission into evidence of the weapons discovered in a court-authorized search of Conn's residence was error. However, the court of appeals correctly upheld their admission on the grounds that weapons are "tools of the [narcotics] trade" and that the existence of the weapons was relevant to both the magnitude of the enterprise and the co-conspirators' resolve (Pet. App. A13). See *United States* v. *Marino*, 658 F.2d 1120 (6th Cir. 1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983